UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CARA LESLIE ALEXANDER, et al.,	)	
Plaintiffs,	)	
v.	)	Civil No. 96-2123
	)	97-1288
	)	(RCL)
FEDERAL BUREAU OF INVESTIGATION, et al.,	)	
Defendants.	)	

MEMORANDUM AND ORDER

This matter comes before the court on Plaintiffs' Motion [488] for Authorization to Take Additional Depositions. Upon consideration of plaintiffs' motion, government defendants' opposition, defendant Hillary Rodham Clinton's opposition, and plaintiffs' omnibus reply, the court will GRANT IN PART and DENY IN PART plaintiffs' motion, as discussed and ordered below.

I. Introduction

The allegations in this case arise from what has become popularly known as "Filegate." Plaintiffs allege that defendant FBI and defendant Executive Office of the President (EOP) willfully and intentionally violated plaintiffs' rights under the Privacy Act. Moreover, plaintiffs allege that Bernard Nussbaum, Craig Livingstone, and Anthony Marceca committed the common-law tort of invasion of privacy by willfully and intentionally obtaining

plaintiffs' FBI files for improper political purposes. Based upon these allegations, plaintiffs seek to certify their lawsuit as a class action on behalf of all "former U.S. Government employees, whose confidential FBI files were improperly obtained from the FBI by the White House." Plaintiffs' Complaint ¶ 15.

On February 18, 1997, the Attorney General of the United States certified that plaintiffs' common law invasion of privacy claims arose from conduct within the scope of Nussbaum's, Livingstone's, and Marceca's employment. For this reason, the United States filed a notice under the Westfall Act, 28 U.S.C. § 2679, to substitute itself for these named defendants. See Notice of Substitution, filed February 18, 1997. Based upon this substitution, the United States moved to dismiss the claims made against it (i.e., those originally made against Nussbaum, Livingstone, and Marceca) for failure to exhaust administrative remedies as provided in the Federal Tort Claims Act. Plaintiffs opposed the United States' notice of substitution and motion to dismiss.

The court later held a hearing on all pending motions, including the United States' notice of substitution and plaintiffs' motion for class certification. On June 12, 1997, the court deferred ruling on these two matters pending the opportunity for plaintiffs to take some limited discovery. In later ruling upon the parties' Local Rule 206 report, the court held that plaintiffs would have six months to complete all discovery relating to the

scope-of-employment[1] and class certification issues.[2] Order of August 12, 1997. The court also set a presumptive limit of twenty depositions for each side during this initial discovery period, with a six-hour maximum for each deposition. Finally, the court ordered plaintiffs to file within ten days after the close of this initial phase of discovery supplemental memoranda on the issues of class certification and scope of employment, in addition to setting deadlines for opposition and reply memoranda. Following resolution of the class certification and scope-of-employment issues, the court contemplated that there would be a period of further

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[1]For the sake of brevity, the court will refer to the issues raised by the Attorney General's certification for the substitution of the United States under the Westfall Act as the "scope-of-employment" issue.

[2]The court did not, however, require that discovery during this initial phase be limited solely to the issues of class certification and scope of employment. It only held that discovery on those two issues must be completed during the initial phase.

The six-month deadline originally contemplated and ordered by the court has long since passed. The parties agreed to an 81-day extension of the initial discovery phase, until May 4, 1998. No further stipulation or order of the court has extended the date-certain cutoff for initial discovery, however. Therefore, the court will vacate the portion of its August 12, 1997 order setting a six-month deadline on the initial phase of discovery. As explained below, the initial phase of discovery, as limited by this memorandum and order, shall end on June 12, 1999.

The court notes, however, that the original six-month period contemplated by the court became unworkable because of, at least in part, protracted discovery disputes between the parties and unreasonably delayed document production by defendants. Nonetheless, plaintiffs have now been afforded nearly two years of discovery, and this amount of time, in addition to what the court will order today, should be more than sufficient time for full discovery on the issues of class certification and scope of employment.

discovery, followed by dispositive motions, if appropriate. Because plaintiffs have exhausted their presumptive limit of depositions for this initial discovery period, they now seek leave of court to depose further witnesses.

II. Analysis

Now that plaintiffs have taken twenty-six depositions in this case and already have been granted leave to take two more,[3] plaintiffs proclaim that they are ready to "delve into the heart of their case." Plaintiffs' Mot. at 2. In short, plaintiffs contend that they should be allowed further depositions because twenty-eight is simply not enough to make an adequate examination of the class certification and scope-of-employment issues. Moreover, plaintiffs claim that their efforts to date, which they characterize as proceeding "in the most expeditious manner possible," have been hampered by the government defendants' stonewalling tactics. Plaintiffs' Reply at 1. Based on this predicate, plaintiffs list approximately 38 people whom they wish to depose, and allude to an ambiguously defined, limitless amount of other people from whom they may also seek testimony.[4]

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[3]The court has granted plaintiffs leave to depose Betsy Pond and Deborah Gorham.

[4]The court is concerned by plaintiffs' apparent misconception of the discovery process in federal court litigation. Plaintiffs append to their reply memorandum a list of witnesses deposed by Congress in its investigation of the FBI-files matter and indicate that plaintiffs need to depose many, if not all, of the same people. What plaintiffs misunderstand, however, is that they are not, as this court has stated before, a "roving commission" automatically entitled to perform a more exhaustive job of Congress's investigation. See Alexander v. FBI, Civ. No. 96-2123, Memorandum and Order at 5 (D.D.C. Dec. 7, 1998). The idea that plaintiffs are entitled to take the depositions of the same people as Congress, without any proper basis of relevancy or need, is simply beyond the pale.

Defendant EOP's response to plaintiffs' request is based upon two arguments. First, defendant EOP claims that the principles embodied by the Westfall Act, dealing with the proper substitution of the United States for federal employees in certain situations, require a determination of the scope-of-employment issue immediately and, correspondingly, mandate that plaintiffs be denied any further discovery on this issue. Second, defendant EOP contends that any insufficiency of discovery suffered by plaintiffs was caused by plaintiffs' own squandering of opportunities. In other words, according to defendant EOP, plaintiffs have wasted their presumptive number of depositions on less relevant but more newsworthy deponents.

The court believes that the concerns raised and arguments made by defendant EOP are valid. Accordingly, the court will grant plaintiffs leave to take a maximum of only five more depositions on the issues of class certification and scope of employment.[5] This holding strikes the proper balance between plaintiffs' right to discovery on their allegations, defendants' right to an expeditious determination of the class certification and scope-of-employment issues, and plaintiffs' inefficient discovery practices.

The court has already stated during the hearing held with regard to the underlying scope-of-employment and class certification matters that the Westfall Act was intended to provide

[5]The depositions of Pond and Gorham will not be counted against these five depositions.

government employees immunity not only from trial, but from discovery as well. Discovery on the scope-of-employment issue, as well as class certification, has now been ongoing for approximately twenty-two months. The court cannot allow plaintiffs more than five additional depositions and reasonably stay in accordance with the purpose of the Westfall Act. See Brown v. Armstrong, 949 F.2d 1007, 1012 (8th Cir. 1991) (holding that "challenges to the Attorney General's certification must be resolved . . . as soon after the motion for substitution as possible").

But the Westfall Act is not the only rule of law calling for expeditious rulings in this case. Rule 23(c)(1) of the Federal Rules of Civil Procedure requires that, "*[a]s soon as practicable* after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained." FED. R. CIV. P. 23(c)(1) (emphasis added). It is the court's view that allowing plaintiffs greater than five additional depositions and nearly two years in total discovery on class certification would run afoul of this FED. R. CIV. P. 23(c)(1) standard for class certification.

The court is cognizant that plaintiffs may claim to be prejudiced by these limitations. After all, plaintiffs have still not deposed the figures presumably at the center of their allegations—e.g., defendants Nussbaum, Livingstone, and Marceca. Any such argument must be rejected, however, because the court has

given plaintiffs more than satisfactory leeway to fully examine the issues of class certification and scope of employment. To the extent that plaintiffs are prejudiced by the court's ruling today, the prejudice is self-inflicted. To date, plaintiffs have simply not executed a discovery plan that would expeditiously lead to the evidence they seek in order to avoid the substitution of the United States as a party and to prevail on their motion for class certification. The court is unwilling to allow plaintiffs any discovery on these topics beyond what is ordered today. As plaintiffs are well aware, defendants have the right to expeditious rulings on these issues.

III. Conclusion

For the reasons stated above, the court HEREBY ORDERS that Plaintiffs' Motion [488] for Authorization to Take Additional Depositions is GRANTED IN PART and DENIED IN PART. In this regard, it is ORDERED that:

1. The court grants plaintiffs leave to take a total of five additional depositions on the issues of class certification and substitution of the United States under the Westfall Act for defendants Nussbaum, Livingstone, and Marceca. This number excludes those depositions for which the court has already granted plaintiffs leave.

2. Plaintiffs must conclude all discovery, including all depositions, on the issues of class certification and substitution

of the United States under the Westfall Act for defendants Nussbaum, Livingstone, and Marceca, on or before June 12, 1999.

3. All discovery motions, including but not limited to motions to compel, pertaining to the issues of class certification and substitution of the United States under the Westfall Act for defendants Nussbaum, Livingstone, and Marceca must also be filed by June 12, 1999.

4. Plaintiffs' motion is denied in all other respects.

The court FURTHER ORDERS that the provision of its Order of August 12, 1997 setting a six-month deadline on the initial phase of discovery is HEREBY VACATED. The initial phase of discovery shall end on June 12, 1999, as provided above.

It is FURTHER ORDERED that the deadlines for the filing of supplemental memoranda on the issues of class certification and substitution of the United States under the Westfall Act for defendants Nussbaum, Livingstone, and Marceca shall remain the same as provided in the court's scheduling order of August 12, 1997.

SO ORDERED.

Date:

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Royce C. Lamberth
United States District Court